

P O R T E R | S C O T T

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WITHERS FOOD SERVICE, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

RICK FUTIA,

Case No. CV08 1207-HRL

Plaintiff,

**DEFENDANT WITHERS FOOD
SERVICE, INC.'S ANSWER TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT AND DEMAND FOR JURY
TRIAL**

v.

WITHERS FOOD SERVICE, INC., JOHN
PAK, JEEHEE PAK and MEXPORT, INC.,

Compl. Filed: 02/28/08
First Amended Compl. Filed: 04/03/08

Defendants.

Defendant WITHERS FOOD SERVICE, INC. answers Plaintiff's First Amended Complaint
as follows:

Answering Paragraph 1, Defendant lacks information sufficient to admit or deny the
allegations contained in said paragraph and on that basis denies each and every allegation contained
in said paragraph.

Answering Paragraph 2, Defendant admits that Kirk's Steakburgers is a restaurant located at
1330 South De Anza Blvd., San Jose, California and is a restaurant open to the public. Defendant
operates and leases the restaurant, but does not own the land.

1 Answering Paragraph 3, Defendant lacks information sufficient to admit or deny the
2 allegations contained in said paragraph, which include legal conclusions and on that basis denies each
3 and every allegation contained in said paragraph.

4 Answering Paragraphs 4, 5 and 6, Defendant admits that jurisdiction and venue are proper and
5 assignment to the San Jose intradistrict is proper.
6

7 Answering Paragraph 7, the allegations in said paragraph contain legal conclusions which do
8 not require a response and on that basis, Defendant denies each and every allegation contained in said
9 paragraph.

10 Answering Paragraph 8, no response is required.

11 Answering Paragraph 9, Defendant admits that it operated a restaurant called Kirk's
12 Steakburgers and denies the remaining allegations on the grounds that they are legal conclusions.
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14 Answering Paragraph 10, Defendant lacks information sufficient to admit or deny the
15 allegations which include legal conclusions and on that basis they are denied.

16 Answering Paragraph 11, the allegations consist of legal conclusions and on that basis
17 Defendant denies each and every allegation of said paragraph.
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19 Answering Paragraph 12, the allegations consist of legal conclusions and on that basis
20 Defendant denies each and every allegation of said paragraph.

21 Answering Paragraph 13, Defendant lacks information sufficient to admit the allegations
22 contained in said paragraph and on that basis denies each and every allegation contained in said
23 paragraph.

24 Answering Paragraph 14, the allegations are legal conclusions and on that basis, Defendant
25 denies each and every allegation contained in said paragraph.
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1 Answering Paragraph 15, Defendant lacks information sufficient to admit the allegations
2 contained in said paragraph. Additionally, the allegations contained in said paragraph contain legal
3 conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

4 Answering Paragraph 16, Defendant lacks information sufficient to admit the allegations
5 contained in said paragraph. Additionally, the allegations contained in said paragraph contain legal
6 conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

7 Answering Paragraph 17, Defendant lacks information sufficient to admit the allegations
8 contained in said paragraph. Additionally, the allegations contained in said paragraph contain legal
9 conclusions and on that basis, Defendant denies each and every allegation contained in said paragraph.

10 Answering Paragraph 18, the allegations contained in said paragraph contain legal conclusions
11 and on that basis, Defendant denies each and every allegation contained in said paragraph.

12 Answering Paragraph 19, Defendant incorporates the answers to Paragraphs 1-18 above.

13 Answering Paragraph 20, the allegations contained in said paragraph contain legal conclusions
14 and on that basis, Defendant denies each and every allegation contained in said paragraph.

15 Answering Paragraph 21, the allegations contained in said paragraph contain legal conclusions
16 and on that basis, Defendant denies each and every allegation contained in said paragraph.

17 Answering Paragraph 22, the allegations contained in said paragraph contain legal conclusions
18 and on that basis, Defendant denies each and every allegation contained in said paragraph.

19 Answering Paragraph 23, the allegations contained in said paragraph contain legal conclusions
20 and on that basis, Defendant denies each and every allegation contained in said paragraph.

21 Answering Paragraph 24, the allegations contained in said paragraph contain legal conclusions
22 and on that basis, Defendant denies each and every allegation contained in said paragraph.

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1 Answering Paragraph 25, the allegations contained in said paragraph contain legal conclusions
2 and on that basis, Defendant denies each and every allegation contained in said paragraph.

3 Answering Paragraph 26, the allegations contained in said paragraph contain legal conclusions
4 and on that basis, Defendant denies each and every allegation contained in said paragraph.

5 Answering Paragraph 27, the allegations contained in said paragraph contain legal conclusions
6 and on that basis, Defendant denies each and every allegation contained in said paragraph.
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8 **AFFIRMATIVE DEFENSES**

9 **FIRST AFFIRMATIVE DEFENSE**

10 The First Amended Complaint, in its entirety and through each separately stated cause of
11 action, fails to state facts sufficient to constitute a viable cause of action against this answering
12 Defendant upon which relief can be granted.
13

14 **SECOND AFFIRMATIVE DEFENSE**

15 Defendant avers that Plaintiff's First Amended Complaint is barred, in whole or in part, by the
16 applicable statute of limitations.

17 **THIRD AFFIRMATIVE DEFENSE**

18 Defendant avers that Plaintiff has failed to notify Defendant and appropriate state authorities
19 about the averred violations, and therefore failed to exercise his administrative exhaustion
20 requirements under California and federal law. Plaintiff has failed to notify Defendant in order to
21 provide an opportunity to remediate before filing suit to likely resolve averred access problems fairly,
22 and therefore failed to reasonably mitigate his damages.
23

24 **FOURTH AFFIRMATIVE DEFENSE**

25 Defendant asserts the financial and feasible defense based on future construction/contractor
26 bids regarding proposed access changes.
27

1 **FIFTH AFFIRMATIVE DEFENSE**

2 Defendant is informed and believes that some or all of the proposed access changes are not
3 “readily achievable” as defined by applicable access law and/or are *de minimus* alleged violations.

4 **SIXTH AFFIRMATIVE DEFENSE**

5 Defendant is informed and believes that any proposed access changes would cause a loss of
6 function, space or facility where the general public is concerned, and that said proposed changes
7 would cause practical difficulty, unnecessary hardship, and extreme difficulty, and the equivalent
8 facilitation has been provided.

9
10 WHEREFORE, Defendant WITHERS FOOD SERVICE, INC. prays for judgment against
11 Plaintiff RICK FUTIA as follows:

- 12 1. Denial of all right to injunctive relief, declaratory judgment, and/or damages pursuant
13 to Plaintiff’s claims in the First and Second Claims for Relief;
14
15 2. Denial of any and all damages, including attorney’s fees, litigation expenses, costs and
16 punitive damages;
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18 3. For reasonable attorney’s fees and litigation expenses and costs in defense of Plaintiff’s
19 First Amended Complaint; and
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21 4. Such other and further relief as the court may deem just and proper.

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DEMAND FOR JURY TRIAL

The Defendant WITHERS FOOD SERVICE, INC., hereby demands a jury trial on all issues to which such a right exists.

DATED: May 5, 2008

PORTER SCOTT
A PROFESSIONAL CORPORATION

By /s/ STEPHEN E. HORAN
STEPHEN E. HORAN, ESQ.
Attorneys for Defendant,
WITHERS FOOD SERVICE, INC.